



Yukon Legislative Assembly
33rd Yukon Legislative Assembly

**Final Report of the Select Committee
on Whistle-blower Protection**

December 2012

December 4, 2012

Honourable David Laxton, MLA
Speaker of the Yukon Legislative Assembly

Dear Mr. Speaker:

Your Select Committee on Whistle-blower Protection, appointed by Order of the Assembly on April 2, 2012, as amended by Order of the House on April 30, 2012, has the honour to present its Final Report, and commends it to the House.

Patti McLeod
Chair of the Committee
(MLA – Watson Lake)



Select Committee on Whistle-blower Protection

Members of the Committee:

Patti McLeod, Chair of the Committee, MLA (Watson Lake)

Hon. Doug Graham, MLA (Porter Creek North)

Stacey Hassard, MLA (Pelly-Nisutlin)

Sandy Silver, MLA (Klondike)

Jan Stick, MLA (Riverdale South)

Clerk to the Select Committee:

Linda Kolody, Deputy Clerk of the Yukon Legislative Assembly

The Committee's Mandate

On April 2nd this year, the Select Committee on Whistle-blower Protection ("the Committee") was established when the Assembly adopted a motion (Motion #120) moved by the Government House Leader, the Hon. Brad Cathers. This Order of the House established the initial membership of the Committee, and set out the Committee's mandate (or purpose) and terms of reference.

A subsequent motion adopted by the House on April 30, 2012 amended the Committee's initial membership and terms of reference. This amending motion (Motion #195) was also moved by the Government House Leader.¹

As outlined in the initial Order establishing the Committee, the role of the Committee is not to draft legislation, but to report to the House "its findings and recommendations respecting the central issues that should be addressed in whistle-blower protection legislation..." This includes the Committee's recommendation "as to whether whistle-blower protection legislation should include a sunset clause similar to that [formerly] found in section 35 of the Ombudsman Act."

In conducting its work, the Committee had access to the records of the previous incarnation of the Committee from the preceding Legislature, including the written submissions that were made to that Committee.²

Once the Committee presents its Final Report to the House (this document constitutes that report), the Committee has fulfilled its mandate, and ceases to exist (it is said that the Committee has "dissolved"). It is then up to the Legislative Assembly to accept, or reject, any or all of the Committee's recommendations.

¹ Motion #120 and Motion #195 are posted on the Committee's webpage at:
<http://www.legassembly.gov.yk.ca/1097.html>

² These submissions are posted at: <http://www.legassembly.gov.yk.ca/672.html>

The initial motion creating the Committee (Motion #120) states:

"THAT a Select Committee on Whistle-blower Protection be established,

THAT the honourable member Patti McLeod, be the Chair of that Committee,

THAT the honourable members Stacey Hassard, Hon. Doug Graham, Jan Stick, and Darius Elias be appointed to the Committee,

THAT the Committee shall have access to records generated by, or gathered by the Select Committee on Whistle-blower Protection established by Motion No. 125 of the 32nd Legislative Assembly,

THAT the Committee report to the House its findings and recommendations respecting the central issues that should be addressed in whistle-blower protection legislation including:

- (1) whether all public institutions and private organizations performing "public" functions will be covered,
- (2) whether only employees or others -- unions, advocacy groups, the media, citizens -- can use this legislation,
- (3) what types of wrongdoing will be covered,
- (4) whether the same office will conduct investigation, mediation and the protection of whistle-blowers,
- (5) whether employees will have to exhaust departmental procedures before approaching the whistle-blower protection office,
- (6) how retaliation against whistle-blowers will be defined and how long protection will exist,
- (7) whether there will be a reverse onus on the employer to demonstrate that adverse decisions on a whistle-blowing employee were not a reprisal,
- (8) what remedies for employees judged to be adversely affected will be specified in the legislation; and
- (9) what sorts of consequences there will be for employees who engage in reckless or malicious accusations of wrongdoing and for managers who engage in reprisal against employees who act in good faith,

THAT the Committee report to the House its recommendation as to whether whistle-blower protection legislation should include a sunset clause similar to that found in section 35 of the *Ombudsman Act*,

THAT the Committee have the power to call for persons, papers and records and to sit during inter-sessional periods,

THAT the Committee may hold hearings for the purpose of receiving the views and opinions of Yukon citizens and interested groups on whistle-blower protection legislation,

THAT the Committee have the power to seek background information from experts and to be able to call and hear these experts as witnesses,

THAT while all testimony provided to the Committee shall be in a matter of public record, the Committee have the power to hold in-camera meetings and to direct that the records of the Committee, in specific instances, not contain details that could lead to the identification of an individual, group, third party, or community,

THAT if the House is not sitting at such time as the Committee is prepared to present its report, the Committee transmit its report to all Members of the Legislative Assembly and then, not more than one day later, release the report to the public; and

THAT the Clerk of the Legislative Assembly be responsible for providing the necessary support services to the Committee."

The motion (Motion #195) amending the preceding Order reads:

“THAT the membership of the Select Committee on Whistle-blower Protection, as established by Motion #120 of the First Session of the 33rd Legislative Assembly, be amended by:

- (1) rescinding the appointment of Darius Elias to the Committee; and
 - (2) appointing Sandy Silver to the Committee
- and

THAT the mandate of the Committee, as stipulated in Motion #120, be amended by adding the following:

‘THAT if the Committee believes that its Final Report will not be completed in such time as to be tabled during the 2012 Fall Sitting of the Legislative Assembly, the Chair of the Committee shall table in the House, during the 2012 Fall Sitting, an interim report on the Committee’s progress, which shall inform the House of the Committee’s expected date for completion of a Final Report.’”

Principles – The Committee's Recommendations on Central Issues

Central issues that should be addressed in whistle-blower protection legislation, and the Committee's recommendations regarding them, are as follows:

Will all public institutions and private organizations performing "public" functions be covered?

Recommendation #1: The Committee recommends that all Yukon government departments and Yukon government corporations³ be covered by whistle-blower protection legislation.

The Committee further recommends that the possibility of extending coverage to additional public institutions, non-profit organizations, and private organizations, be considered during a mandatory review of the legislation, to occur within the first five years of the legislation's passage.

Will only employees or others -- unions, advocacy groups, the media, citizens -- be able to use this legislation?

Recommendation #2: Only employees⁴ will be able to use this legislation. The Committee believes that various existing avenues are available to other groups and individuals.

What types of wrongdoing will be covered?

Recommendation #3: The Committee recommends that whistle-blower protection legislation incorporate the recommendation of the Public Service Commission,⁵

that the "types" of wrongdoing that may be specified in Yukon legislation be in keeping with legislation in other jurisdictions and with existing Yukon legislation, policy and regulation, including matters such as:

1. contravention of an Act of [the] Parliament [of Canada] or of this [Yukon] Legislature or regulations [made pursuant to such Acts];

³ i.e., Yukon College, the Yukon Development Corporation, the Yukon Energy Corporation, the Yukon Hospital Corporation, the Yukon Housing Corporation, the Yukon Liquor Corporation, the Yukon Workers' Compensation Health and Safety Board, and the Yukon Lottery Commission.

⁴ Including contract employees

⁵ In the Commission's submission to the Select Committee on Whistle-blower Protection in the 32nd Yukon Legislature, <http://www.legassembly.gov.yk.ca/pdf/psc.pdf>, at p. 5.

2. gross mismanagement of public funds or assets;
3. an act or omission that creates substantial and specific danger to the life, health or safety of persons or to the environment; and
4. knowingly directing or counseling a person to commit an act of wrongdoing.

The Committee also recommends "that disclosures that will not be protected in legislation also be delineated. Exceptions to disclosures could include information that would disclose deliberations of Cabinet, information protected by solicitor-client privilege and information for which disclosure is prohibited under another [A]ct or regulation."⁶

We further recommend "that there be a provision for exceptional events where there is reasonable belief that public disclosure is necessary to prevent imminent and serious danger to life, health or safety of a person and when there is not sufficient time to make a disclosure through established processes."⁷

The Committee believes that it is important to ensure that corrective actions⁸ are available and taken in cases of wrongdoing.

Will the same office conduct investigation, mediation and the protection of whistle-blowers?

Recommendation #4: Yes; the Committee recommends that the Ombudsman's Office be responsible for conducting investigations, mediation and the protection of whistle-blowers.⁹

In larger jurisdictions, it might be appropriate to establish separate offices for different aspects of the process, or to deal with different kinds of complaints. However, the Committee is of the opinion that the scale of events in Yukon does not warrant the establishment of, or allocation of responsibilities to, more than one office.

Will employees have to exhaust departmental procedures before approaching the whistle-blower protection office?

Recommendation #5: Yes; the Committee recommends that employees exhaust departmental procedures, where they exist, before approaching the Ombudsman's Office.

The Committee further recommends that the Ombudsman's Office not actively engage a complaint that is being pursued through another process (such as the Human Rights Commission, etc.).

⁶ Ibid.

⁷ Ibid.

⁸ in whatever form is appropriate -- e.g. disciplinary measures; the laying of charges by the RCMP where the law has been broken, etc.

⁹ In the event of a disclosure concerning the Ombudsman's Office, the Committee recommends that the Members' Services Board of the Yukon Legislative Assembly determine how to proceed (so that the Ombudsman's Office is not put in the position of investigating itself).

How will retaliation against whistle-blowers be defined and how long will protection exist?

Recommendation #6: The Committee recommends that reprisal against whistle-blowers be defined along the lines of that in Manitoba's legislation:¹⁰

"reprisal" means any of the following measures taken against an employee because the employee has, in good faith, sought advice about making a disclosure, made a disclosure, or co-operated in an investigation under this Act:

- (a) a disciplinary measure;
- (b) a demotion;
- (c) termination of employment;
- (d) any measure that adversely affects his or her employment or working conditions;
- (e) a threat to take any of the measures referred to in clauses (a) to (d).

As regards the length of time that whistle-blowers have to make a complaint, the Committee recommends that offences be reported within two years of the incident. We further recommend that the Ombudsman's Office be given discretionary powers to allow for some flexibility in respect of this deadline, especially within the first two years of the legislation's passage.

The Committee believes it is important to ensure that protection from reprisal for whistle-blowers exists as long as the person is employed.

With regard to managers who engage in reprisal against employees who act in good faith, the Committee recommends that the manager be subject to a fine of up to \$10,000, and discipline up to and including dismissal, where that is justified. Such discipline should be applied according to the process that applies to the manager's workplace, where such a process exists. Where such a process does not exist, this should be undertaken by the Ombudsman's Office.

Will there be an onus on the employer to demonstrate that adverse decisions on a whistle-blowing employee were not a reprisal?

Recommendation #7: Should the whistle-blower demonstrate to the satisfaction of the Ombudsman's Office that their disclosure was a contributing factor in the action taken against them, the onus should then shift to the employer to show by clear and convincing evidence that the employer had other legitimate reasons for taking the action in question.

¹⁰ In section 2 ("Definitions") of *The Public Interest Disclosure (Whistleblower Protection) Act*, CCSM, c. P217, as downloaded from <http://www.canlii.org/en/mb/laws/stat/ccsm-c-p217/latest/ccsm-c-p217.html> on August 1, 2012.

What remedies for employees judged to be adversely affected will be specified in the legislation?

Recommendation #8: The Committee believes that any employee who has been treated wrongfully should be compensated and treated fairly. Therefore, the Committee does not see any reason to limit the types of remedy available to a complainant. Complaints must be proved, therefore it should be left to the Ombudsman's Office to decide what type of remedy is appropriate in a given circumstance.

What consequences will there be for employees who engage in reckless or malicious accusations of wrongdoing?

Recommendation #9: With regard to employees who engage in reckless or malicious accusations that are found to be without substance, the Committee recommends that the employee be subject to a fine of up to \$10,000, and discipline up to and including dismissal, where that is justified. Such discipline should be applied according to the process that applies to the employee's workplace, where such a process exists. Where such a process does not exist, this should be undertaken by the Ombudsman's Office.

Should whistle-blower protection legislation include a sunset clause similar to the one formerly contained in section 35 of the Ombudsman Act?¹¹

Recommendation #10: The Committee recommends that whistle-blower protection legislation not include a sunset clause. Instead, the Committee recommends that whistle-blower protection legislation provide for mandatory review of the legislation within the first five years of its passage.

¹¹ Note: This sunset clause was abolished through Bill #102, *Act to Amend the Ombudsman Act*, which received Assent on April 24, 2012.